Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

93-53

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MERLIN JAY PHILLIPS

Petitioner,

v.

BARBARA HEINE

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Frederic W. Schwartz, Jr.*
Suite 401
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 463-0880
* *Counsel of Record*

Robert Cadeaux
Bart Higgins
Cadeaux and Taglieri
Suite 401
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 785-3373
Of Counsel

Balmar Legal Publishing Services, Washington, D.C., (202) 682-9800

27 pp

QUESTIONS PRESENTED

1. When does a cause of action arise under the Death On The High Seas Act if the inchoate decedent has disappeared without a trace and the governments with jurisdiction, including that of the United States, have sufficient doubts to refuse to certify the party's death?

2. Was the Circuit Court bound by the intent of this Court's holding in *Reading Company v. Koons*, 271 U.S. 58, 63 (1926), that "practical inconveniences or necessary delays" in bringing suit following death delays the accrual of the cause of action beyond the time of death?

3. Was the Circuit Court correct in foreshortening the period before limitation under the Death on the High Seas Act even though it found that the statute should have been equitably tolled in contravention of *United States v. Ibarra*, —U.S.—, 112 S. Ct. 4 (1991)?

TABLE OF CONTENTS

QUESTIONS PRESENTED i
OPINIONS BELOW 1
JURISDICTION 1
STATEMENT OF THE CASE 2
STATUTES INVOLVED 2
REASONS FOR GRANTING THE WRIT 3
I. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THE INTENT OF THIS COURT'S HOLDING IN *READING COMPANY v. KOONS*, 271 U.S. 58 (1926), SUBSEQUENT DECISIONS OF THIS COURT, AND THE COMMON SENSE THEY EMBODY 3
II. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RATIONALE IN *UNITED STATES V. IBARRA*, —U.S.—, 112 S. Ct. 4 (1991), AND THE LOGICAL RESULT IT PROPOUNDED 7
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

American Pipe & Construction Co. v. Utah, 414 U.S. 538 (1974), *rehearing denied* 415 U.S. 952 8

Burnett v. New York Central Railroad, 380 U.S. 424 (1965) 7

Cada v. Baxter Healthcare Corp., 920 F. 2d. 446 (7th Cir. 1990), *cert. denied*, —U.S.—, 111 S. Ct. 2916, 115 L. Ed. 2d 1079 (1991) . . 9

Crown Coat Front Co. v. United States, 386 U.S. 503 (1967) 4

Grayson v. Harris, 279 U.S. 300 (1929) 5

Reading Company v. Koons, 271 U.S. 58 (1926) . . . 4,6,7

United State v. Ibarra, —U.S.—, 112 S. Ct. 4 (1991) 7,9

United States v. Wurts, 303 U.S. 414 (1938) 5

Statutes:

46 U.S.C. 761, *et sec* 1,8

46 U.S.C. 763a 2,3

Cal. H & SC Sec. 10550 3

Sec. 21-2051, D.C. Code (1989 Repl. Vol.) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MERLIN JAY PHILLIPS,

Petitioner

v.

BARBARA HEINE,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Merlin Jay Phillips, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in the above proceeding on November 23, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at 984 F. 2d. 489, and is reprinted in the appendix at page 5a *infra*.

The memorandum decision of the United States District Court for the District of Columbia (Gasch, D.J.) has not been reported. It is reprinted in the appendix at 1a *infra*.

JURISDICTION

This action was filed on December 12, 1990 in the District Court for the District of Columbia under 46 U.S.C. 761, *et sec.*, the Death on the High Seas Act (DOHSA). On March 27, 1991, the Hon. Oliver Gasch dismissed the action as being untimely brought. *See* App. at 1a.

On petitioner's appeal, the District of Columbia Circuit affirmed the District Court. The petitioner's petition for rehearing or rehearing *en banc* was denied.

The jurisdiction of this Court was invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued. 46 U.S.C. 763a

STATEMENT OF THE CASE

The petitioner's decedent, Brian Phillips, was one of three passengers in a small airplane which disappeared off the coast of Italy on March 21, 1987. Neither the airplane nor the remains of any person on the airplane has ever been found. When Mr. Phillips disappeared, the petitioner, who is Mr. Phillips' father, and his mother attempted to obtain legal certification of his death from the United States Department of State. After a year-long and extensive investigation during which no evidence of the airplane or its passengers was found, the Italian and Maltese governments refused to issue a death certificate, the Italian government stating that it was unable "to formulate hypotheses about the disappearance of the aircraft whether due to an actual or simulated accident". Consequently, the United States Department of State on April 29, 1988 refused to issue a "Consular Report of Death of an American Citizen Abroad".

Following their failure to obtain either a presumption of death certificates from the involved foreign governments or equivalent assistance from the Department of State, Mr. Phillips' parent consulted counsel in California and initiated proceedings under the California statutes to obtain an Order

Establishing Fact of Death by submitting material relating to the disappearance and the Italian, Maltese and American responses. Cal. H & SC Sec. 10550. That Order was issued by the California Superior Court on March 20, 1990, and the petitioner began the process necessary to be appointed the personal representative of the estate. On December 12, 1990, petitioner filed suit against the pilot. The petitioner's case was consolidated for all purposes with that of the other two passengers which, unbeknownst to him, had previously been filed in Washington, D.C.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THE INTENT OF THIS COURT'S HOLDING IN *READING COMPANY v. KOONS*, 271 U.S. 58 (1926), SUBSEQUENT DECISIONS OF THIS COURT, AND THE COMMON SENSE THEY EMBODY

The DOHSA provides, in pertinent part:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued. 46 U.S.C. 763a.

Thus, the Court must plumb the metaphysical paradoxes implicit in determining in the case of a disappeared person when "the cause of action accrued".

Statute of limitations have been crafted to provide a full and fair balance between the right of a plaintiff to bring a claim and the right of a defendant to have readily available the tools to defend that claim. On one hand, the statute of limitations is customarily long enough so that the first thought of a victim or the victim's family does not have to be who can I sue. On the

other hand, the statute of limitations is customarily short enough so that witnesses are available and memories have not faded.

This scheme is disrupted, however, when there is an impediment to the plaintiff bringing suit. In these instances, out of a sense of fair play, the running of the statute is delayed during the period for which the impediment is a bar to bringing suit. To this end, the law employs two tools to delay the running of the statute of limitations. The first device delays the point at which the cause of action accrues until the time the legal action can first be maintained in Court. The second device, tolling, delays the point at which the cause of action expires by adding to the statutory period the length of time the impediment is in effect.

This Court in *Reading Company v. Koons*, 271 U.S. 58, 61-62 (1926), in considering a kindred problem, stated:

> We do not think it is possible to assign to the word "accrued" any definite technical meaning which by itself would enable us to say whether the statutory period begins to run at one time or the other; but the uncertainty is removed when the word is interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought.

This is because, as the Court put it, "at the death of decedent there are real parties in interest who may procure the action to be brought; and there are no such practical inconveniences or necessary delays as would lead to the conclusion that the word 'accrued', as used in the statute, cannot be taken to refer to the time of death." *Id* at 271 U.S. 62-64. *See also Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967).

When there are "such practical inconveniences or necessary delays", this Court has found that there is a consonant delay

in the accrual of the cause of action. For example, actions by and against the government accrue when the plaintiff can first institute and maintain an action in court. *United States v. Wurts*, 303 U.S. 414, 418 (1938). A similar result is found in actions between private parties. *Grayson v. Harris*, 279 U.S. 300, 304, 305 (1929).

The practical ends which are to be served by the limitation of time within which the action must be brought here are readily apparent. The DOHSA statute of limitations, like all statutes of limitations, is meant to avoid prejudicing the defendant with a stale claim being brought at a time when memory fades and witnesses are unavailable, to paraphrase innumerable decisions. Under the circumstances of this case, however, the petitioner's action could not be brought without defying both law and logic. If one assumed that Mr. Phillips died in an airplane crash on March 21, 1987, then one must also assume that the pilot died in the same crash. Thus, a suit on behalf of Mr. Phillips could not be brought against the pilot since suit can only be brought against the personal representative of a dead person. Conversely, if one assumed that the pilot did not die, one must also have assumed that Mr. Phillips did not die. Thus, only Mr. Phillips could sue. Further, there would be no basis for suit unless Mr. Phillips suffered injury, and there would be no way to determine whether or not he was injured since he had disappeared. To have assumed that Mr. Phillips was dead, but that the pilot was alive would have violated the previously unarticulated principle of parity of fictions as well as Fed. R. Civ. Proc. 11.

To defeat this conundrum, Mr. Phillips' parents were required to establish *de jure* what they were unable to establish *de facto*. They did so in what appeared to be the most expeditious fashion, initially requesting from the foreign governments with investigative jurisdiction over the involved air space the appropriate documentation to establish their son's death. When the State Department advised that the appropriate foreign

government were unwilling to cooperate and that the United States government believed it was unable to help, Mr. Phillips' parents utilized the documentation which had been extracted from the governments of Italy, Malta and the United States to satisfy their burden of proof in their California Petition to Establish Fact of Death. The Court Order establishing Mr. Phillips' death was filed on March 20, 1990, and it was not until this juncture that Mr. Phillips' parents were able to bring an action alleging his death. Consequently, it was at this juncture that the cause of action arose.

Having someone to bring suit and having something to sue about is not sufficient, however, if there is no one to sue. Serendipitously, the passage by the District of Columbia Council of a statutory mechanism which took effect some five months earlier on September 30, 1989, and which authorized suing the pilot through a conservator, provided a mechanism to allow Mr. Phillips' parents for the first time to institute and maintain an action against the defendant. *See* Sec. 21-2051, D.C. Code (1989 Repl. Vol.) Alternatively, therefore, it was the appointment of the pilot's conservator on February 6, 1990, which gave rise to the cause of action, although judicial symmetry suggests that it was the congruity of a viable plaintiff and a servable defendant in March 1990 which marked the accrual of the cause of action.

At the earliest, the cause of action arose on April 29, 1988, when the State Department refused to issue a "Consular Report of Death of an American Citizen Abroad". It was at this juncture that the petitioner was required to begin again the process to obtain a certificate of death.

The Circuit Court found, however, that the cause of action "accrued at the time of probable death." Relying first on the result in *Reading Co., supra,* the Circuit Court apparently ignored this Court's caveat that the cause of action accrues at the time of death when there are neither practical inconveniences nor necessary delay to bringing suit for the death. Rather, the

Circuit Court in its decision focused on what it considered the petitioner's delays in obtaining the California declaration of death and the alacrity with which it was issued after requested. However, the clear need to obtain a certificate of presumed death and the refusal by the Department of State and appropriate foreign governments to issue one, as contrasted with the ministerial tasks involved in opening up an estate, were precisely the sort of practical inconveniences or necessary delays to which the *Reading Co.* Court referred.

II. THE DISTRICT OF COLUMBIA CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S RATIONAL IN *UNITED STATES V. IBARRA*, — U.S.—, 112 S. Ct. 4, AND THE LOGICAL RESULT IT PROPOUNDED

An alternative and less rarefied mechanism to resolve this appeal is found in the doctrine of tolling, As a starting point, this Court held in *Burnett v. New York Central Railroad*, 380 U.S. 424, 427 (1965):

> The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one "of legislative intent whether the right shall be enforceable * * * after the prescribed time"—the basic enquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances. And "[i]n order to determine congressional intent, we must examine the purposes and policies underlying the limitations provisions, the Act itself, and the remedial scheme developed for the enforcement of rights given by the Act.

Utilizing this standard, the statute of limitations should have been tolled until both the death of Mr. Phillips and a legal conservatorship for the pilot were established. Alternatively, it should have been tolled during the period when the petitioner

was attempting to extract a Consular Report of Death of an American Citizen Abroad from the Department of State. The purpose of the DOHSA is remedial; it provides statutory authority for a wrongful death action in admiralty to parallel the wrongful death actions enacted by the states.

The purpose of the DOHSA statute of limitations is to insure ~~that a~~ defendant will not be prejudiced by stale claims and can act to protect his interests in a timely manner. In this instance, notice of the claim to the defendant pilot was irrelevant since, probably dead, he would never receive it. Service would be impossible for the same reason. Jurisdiction must be *in personam*, not incorporeal.

Further, the evidence and primary witnesses had disappeared, along with the pilot and his passengers, and neither party was prejudiced unfairly by a delay in bringing the action. Until a conservator for the pilot was appointed, the purposes of the statute of limitations would be irrelevant since there would be no one to investigate and defend the claim.

In addition, until Mr. Phillips was legally declared dead there would be no jurisdiction under the statute and no one to bring the action. Thus, the remedial purpose of the statute would be thwarted. While the law permits the heirs of a deceased to bring an action and then amend the Complaint when a personal representative is appointed, there is no rule of law which permits the potential heirs to a potentially dead person to bring an action if the potential decedent has merely disappeared.

The DOHSA requires as a prerequisite to jurisdiction a death and then a suit by the personal representatives of the estate. 46 U.S.C. 761. Thus, Mr. Phillips' parents were required to first establish death, and then bring the action on behalf of the decedent. Not to allow the statute of limitations to be tolled while death was being established clearly runs against the purpose of the DOHSA. *Cf. American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), *rehearing denied* 415 U.S. 952.

The Circuit Court correctly found that the doctrine of equitable tolling could be applied in DOHSA actions. The Court, however, determined that equitable tolling did not automatically extend the statute by the period during which it was tolled, but rather by only the extra time it determined that the petitioner needed to bring the action. The Panel considered this period to be less than the nine and one-half months which appellants took after the period of limitations began to run.

This approach runs counter to the principle adopted by this Court, albeit in *dicta*, United State v. Ibarra, —U.S.—, 112 S. Ct. 4, 5 note 2 (1991). "Principles of equitable tolling usually dictate that when a time-bar has been suspended and then begins to run again upon a later event, the time remaining on the clock is calculated by subtracting from the full limitations period whatever time ran before the clock was stopped."

No one questions the basic premise that equity is only available to those who act reasonably. Thus, if a party either sleeps on his or her rights or does not experience circumstances which give rise to an inequitable result, equitable tolling is inappropriate. If the Court finds that equitable tolling is appropriate, however, a suspension of the running of the limitations period is arithmetically certain and philosophically appropriate.

The Circuit Court first assumed for the purpose of the decision that the absence of a conservator for the pilot and a declaration of death for petitioner's decedent were circumstances justifying tolling and that it was reasonable for Mr. and Mrs. Phillips to have spent until February 26, 1990, to have obtained a certificate of death. Applying the reasoning of *Cada v. Baxter Healthcare Corp.*, 920 F. 2d. 446 (7th Cir. 1990), *cert. denied*, —U.S.—, 111 S. Ct. 2916, 115 L. Ed. 2d 1079 (1991), the Circuit Court then contradicts itself by holding that it was unreasonable for petitioner not to have utilized the three years from the disappearance of his son in preparing to sue, which is

the purpose of the period before limitation, as well as attempting to legally resolve the disappearance of his son. Thus, the paradoxes created by the Circuit Court are twofold. First, the actions of the petitioner were found to be both reasonable and unreasonable. Second, equitable tolling was found to be appropriate yet no part of the period before limitation was tolled.

The implications of the Circuit Court's decision are troubling. The Circuit Court rejected the statutorily-established principle that three years are permitted to determine whether a cause of action exists and to prepare the appropriate pleadings. The Panel suggests that parents on the disappearance of their child should substitute greed for grief, and that the first thought of a victim's family should be who can be sued. The petitioner in this instance did what a parent normally would do when faced with the most traumatic of family disasters—the unexplained disappearance of a child—they sought to obtain closure by resolving the issue. The Circuit Court found the petitioner's response reasonable, and, indeed, that the foreign authorities were unable to conclude that their son's death had actually occurred. Yet the Panel also concluded that the petitioner's response was unreasonable, that he should have hired a lawyer and been preparing to sue. Consequently, it concluded that no part of the period of limitations should be equitably tolled. This result is simply inconsistent with the decisions of this Court discussed *supra*.

CONCLUSION

Statutes of limitations are meant to be logically implemented and equitably enforced. The decision of the Circuit Court ignores the previous decisions of this Court and their internal logic holding instead that causes of action accrue before an action can properly be brought. Further, it creates a new calculus to resolve tolling questions while rejecting the period which has been set out in the appropriate statute. These are important federal questions which this Court must resolve.

Respectfully submitted,

Frederic W. Schwartz, Jr.*
Suite 401
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 463-0880
* *Counsel of Record*

Robert Cadeaux
Bart Higgins
Cadeaux and Taglieri
Suite 401
1225 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 785-3373
Of Counsel

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MERLIN JAY PHILLIPS,
To be appointed personal representative of
THE ESTATE OF BRIAN T. PHILLIPS
Plaintiff,

v.

BARBARA HEINE,
as conservator for R. Ward Terrell, disappeared,
Defendant.

Civil Action
No. 90-3015 (OG)

JANE T. MYNATT,
as conservator for William T. Mynatt, disappeared,
and
I.G. ARMFIELD,
as conservator for William D. Lamb, disappeared,
Plaintiffs,

v.

BARBARA HEINE,
as conservator for R. Ward Terrell, disappeared,
Defendant.

Civil Action
No. 89-0748 (OG)

Filed March 27, 1991
Clerk, U.S. District Court
District of Columbia

Counsel: Robert Cadeaux, Washington, D.C., for plaintiff.

Kathryn Ledig, Washington, D.C., for defendant.

MEMORANDUM - ORDER

Plaintiff, Merlin Jay Phillips, is the to be appointed representative of the estate of Brian T. Phillips ("Phillips"). Phillips was a passenger in the same plane crash that is the subject of the dispute in *Mynatt v. Heine*, Civil Action No. 89-0748 (OG). On december 20, 1990, the two cases were consolidated. Now before the Court is the defendant's motion to dismiss Phillips on the basis that his complaint was not filed within the applicable statute of limitations.

Under the death on the High Seas Act ("DOHSA"), the statute of limitations states:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

46 U.S.C. App. § 763a. Thus, under the statute, a plaintiff must file a complaint within three years of the time the cause of action accrued.

In this case, the plaintiff alleges that the aircraft, in which Phillips was a passenger, was lost or destroyed on March 21, 1987 and that "Brian T. Phillips was killed or was so injured that he died at the time of the disaster or shortly thereafter." Complaint ¶¶ 9-10. Accordingly, the statute of limitations would appear to run on March 21, 1990, three years after the plane crash. If this is the applicable date, then plaintiff's suit is time-barred because the complaint was not filed until December 12, 1990.

Plaintiff concedes that the above statute governs his claim. He argues, however, two theories explaining why his claim did

not accrue at the time of the accident. The Court finds neither theory persuasive and, consequently, dismisses plaintiff's claim because it was not filed within the three-year statute of limitations.

Plaintiff's first theory is that the cause of action did not accrue until February 26, 1990, the date Phillips was declared dead by a California court. In the context of this case, the argument is flawed. First of all, neither party contests the fact that death occurred on March 21, 1987. Thus, all the cases cited by plaintiff, which involved facts where death was uncertain, are inapplicable to the present case.

In addition, the only reason a death certificate was not obtained until February 26, 1990, was that plaintiff did not file a petition with the California court until February 14, 1990. If plaintiff had filed a petition earlier, a death certificate would have been obtained earlier. The Court finds no basis for allowing a plaintiff to toll the running of the statute until a petition for a death certificate is made.

In the alternative, plaintiff argues that the statute of limitations was tolled until Barbara Heine was appointed as conservator for R. Ward terrell. His theory is that, since a disappeared person does not have that capacity to be sued, the statute of limitations should not run until there is someone who can be sued.

This argument fails to recognize the distinction between commencing an action and perfecting service. The statute of limitations requires that an action be "commenced" within the three-year time period. An action is commenced by filing a complaint. A complaint could have been filed in this case even though service could not have been perfected until after a conservator was appointed. In fact, this is exactly what plaintiffs did in *Mynatt v. Heine*, Civil Action No. 89-0748 (OG). Accordingly, the Court finds no justification for tolling the statute until the date a conservator was appointed.

Wherefore, upon consideration of defendant's motion to dismiss, plaintiff's opposition thereto, and the entire record herein, and for the above-noted reasons, it is by the Court this 26th day of March, 1991,

ORDERED that defendant's motion be, and hereby is, granted; and it is further

ORDERED that plaintiff's complaint in Civil Action No. 90-3015 is dismissed because it was not filed within the three-year statute of limitations; and it is further

ORDERED that this order is only applicable to Civil Action No. 90-3015 and has no effect on Civil Action No. 89-0748

/s/_____
JUDGE OLIVER GASCH

Merlin Jay PHILLIPS to be Appointed
Personal Representative of the Estate
of Brian T. Phillips, Appellant

v.

Barbara Heine, as Conservator for
R. Ward Terrell, Disappeared.

No. 91-7158

United States Court of Appeals
District of Columbia Circuit

Argued Nov. 23, 1992
Decided Feb. 9, 1993

Rehearing and Rehearing En Banc
Denied April 5, 1993

Appeal from the United States District Court
for the District of Columbia;
Civil Action No. 90-3015

Frederic W. Schwartz, Jr., with whom Robert Cadeaux, Washington, DC, was on brief, for appellant.

Kathryn Ledig, Washington, DC, for appellee.

Before: EDWARDS, RUTH BADER GINSBURG and WILLIAMS, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

Appellant's decedent, his son, Brian T. Phillips, was one of three passengers on a plane piloted by appellee's decedent

that disappeared off the coast of Italy on March 21, 1987. No remains were ever found. For the next year appellant sought a report of death from the United States Department of State and the Italian and Maltese governments, but in March 1988 the State Department informed him that it would be unable to obtain such a report. Two years later, on February 14, 1990, Phillips petitioned a California court for a declaration of death; the court promptly, on February 26, 1990, issued an order certifying that Brian Phillips had died at sea on the date the plane disappeared.

Nearly ten months later, on December 12, 1990, appellant filed a suit against appellee, the pilot's conservator, under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. app. § 761 *et seq*. The district judge consolidated this action with a similar suit filed in March 1989 by the survivors of the other two passengers. On March 26, 1991, the district court dismissed the Phillips action as barred by DOHSA's three-year statute of limitations, 46 U S.C. app. § 763a. Five months later, on August 28, 1991, the action filed on behalf of the other two passengers was settled and dismissed. On the same day, Phillips filed a notice of appeal.

Appellee argues that this appeal should he dismissed as untimely because the notice of appeal was not filed within 30 days after the date on which the district court dismissed the Phillips action. See Fed.R.App.P. 4 (requiring filing within 30 days after entry of the judgment or order appealed from). That action, however, was consolidated "for all purposes" with the suits of the other two passengers. See Order of Dec. 20,1990. [Joint Appendix at 9.] Where such a consolidation has occurred, an order disposing of only one party's claim does not start the time for appeal running in the absence of an order under Fed.R.Civ.P. 54(b). "[A]n order deciding fewer than all of several cases consolidated for all purposes does not become a final judgment, absent an 'express determination' to that effect." *Cablevision Systems Development Co. v. Motion Picture Ass'n*

of America, Inc., 808 F.2d 133, Inc. (D.C.Cir.1987) (citing Fed.R.Civ.P. 54(b)). Thus, the appeal was properly taken within 30 days after disposition of all claims of all parties.

DOHSA's three-year statute of limitations provides:

> Unless otherwise specified by law, a suit for recovery of damages for personal injury or death, or both, arising out of a maritime tort, shall not be maintained unless commenced within three years from the date the cause of action accrued.

46 U.S.C. app. § 763a. Phillips first argues that the cause of action did not "accrue" within the meaning of this section until either of two events occurring long after the death—the judicial declaration that Brian Phillips was legally dead (February 26, 1990) or the appointment of a conservator for *defendant's* decedent (February 6, 1990). We believe instead that the cause of action accrued at the time of probable death.

Neither this court nor the Supreme Court has directly addressed the question of when a cause of action for wrongful death accrues under DOHSA. But the Supreme Court ruled on a like issue under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. § 51 *et seq.*, which has a similarly worded time limit: "No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." See 45 U.S.C. § 56 (amended to provide for a three-year limit). In *Reading Co. v. Koons*, 271 U.S. 58, 46 S.Ct. 405, 70 L.Ed. 835 (1926), the Court held that where there are at the time of death "identified persons for whose benefit the liability exists and who can start the machinery of the law in motion to enforce it, by applying for the appointment of an administrator," the cause of action accrues at the time of death and *not* at the time of appointment. *Id.* at 62, 46 S.Ct. at 406-07. The Court pointed out that those capable of *applying* to be appointed administrator could bring the suit, amending their complaint later (even after the running of the statute of limitations) to

identify themselves as executor or administrator. *Id.* Congress, the Court thought, obviously sought a fixed limitation, and could hardly have simultaneously intended "to allow an indefinite period" for appointment of an administrator. *Id.* at 63, 45 S.Ct. at 407; see also In re Petition of *Clinchfield Navigation Co.*, 26 F.2d 290, 291 (S.D.N.Y.1928) (citing *Reading* and holding that a cause of action under the Jones Act, 46 U.S.C. app. § 688, which incorporates FELA, accrues at the time of death and not at the time of declaration of death by a court or appointment of an administrator).

Other courts have applied the same analysis to wrongful death actions under DOHSA. See *O'Neill v. Cunard White Star Ltd.*, 69 F.Supp. 943, 945-46 (S.D.N.Y.1946) (following *Reading* as to accrual of causes of action under both Jones Act and DOHSA); see also *Evers v. Evers Marine Service, Inc.*, 487 F.Supp. 1283, 1288 (D.N.J. 1980) (holding that when a person's disappearance results from a specific peril so that death can be presumed, the DOHSA and Jones Act statutes of limitations begin to run at the time of death). If the accrual of the cause of action starts at death rather than the appointment of an administrator for the plaintiff's decedent, it surely does not await a formal finding of death.

So far as we can determine, no court has even considered Phillips's alternative theory—that accrual starts only when a conservator has been appointed for defendant's decedent. Arguments similar to the ones precluding a similar delay for plaintiff's decedent seem applicable: the idea would supplant a definite period with a highly elastic one. Further, to the extent that the lack of a representative for the pilot's estate might have prevented plaintiff from suing,[1] the problem is one that can be

---

[1] In fact, it appears that absence of a conservator for the pilot would not have delayed suit. None had been appointed at the time his co-plaintiffs filed--March 1989. Plaintiffs in that action requested--and the district court

corrected within the framework of the doctrine of equitable tolling, to which we turn shortly.

In this case, the date of death was indisputably on or about March 21, 1987, the date upon which the plane disappeared; hence the cause of action accrued, and the statute of limitations began to run, on that date.

In the absence of some congressional intent to the contrary, federal statutes of limitation are subject to the doctrine of equitable tolling, which shelters the plaintiff from the statute of limitations in cases where strict application would be inequitable. See *Burnett v New York Central R.R. Co.*, 380 U.S. 424, 427, 85 S.Ct. 1050, 1054,13 L.Ed.2d 941(1965); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir.1990), *cert. denied*, — U.S. — 111 S.Ct. 2916, 115 L.Ed.2d 1079 (1991); *Hill v. Texaco, Inc.*, 825 F.2d 333, 334 (11th Cir.1987); *Timoni v. United States*, 419 F.2d 294, 299 (D.C.Cir.1969) (citing *Burnett*); *Esplin v. Hirschi*, 402 F.2d 94, 103 (10th Cir.1968). Appellant invokes the doctrine, saying that the statute should have been tolled to account for the delay until a conservator had been appointed for the pilot and Brian Phillips had been declared legally dead.

We assume for the purposes of this case that the absence of a conservator for the pilot and of a declaration of death for plaintiff's decedent were circumstances justifying tolling. We also assume that the time appellant spent until February 26, 1990, the date upon which the California court declared Brian Phillips dead, was reasonable in order to establish his death.[2] It does not follow, however, that appellant was entitled to three

---

granted--repeated extensions of time in which to perfect service. Appellee was appointed conservator on February 6, 1990, and plaintiffs were then able to serve her.

[2] This assumption is generous to appellant. The record appears to offer no explanation of why appellant needed two years after the State Department declared itself unable to help to request a certificate of death from the

years from that date to bring the action. Tolling is an equitable doctrine, designed to protect a plaintiff who, through no fault of his or the defendant's,[3] would be barred unfairly by strict application of the statute. Thus, although courts often speak vaguely of the doctrine's suspending the operation of the statute until the tolling circumstance is corrected, tolling does not bring about an automatic extension of the statute of limitations by the length of the tolling period. See *Cada*, 920 F.2d at 452. It gives the plaintiff extra time *only* if he needs it. "If [the plaintiff] doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations", *id.*, which after all exists to advance important interests in evidentiary accuracy and repose. The purposes of the doctrine are fully achieved if the court extends the time for filing by a reasonable period after the tolling circumstance is mended.

[6] Here the justifications for delay, viewed in the light most favorable to plaintiff, ended no later than the California court's certificate of February 26, 1990. The statute, without any tolling, did not expire until March 21, 1990. As nothing had prevented plaintiff from gathering information in the preceding years, and more than three weeks remained, we question whether there was any need to extend the statute at all. But plaintiff's reasonable needs surely did not require extending the time the full nine and one-half months that passed before he filed suit on December 12, 1990. We note that the prior version of the statute, 46 U.S.C. app. § 763 (repealed Pub.L. No. 96-382, Oct. 6, 1980), provided for explicit tolling, but extended the period for only 90 days after the end of the tolling event. When

---

California courts. Given our disposition of this case, however, we need not address this or any other questionable delays by appellant.

[3] Equitable tolling thus contrasts with equitable *estoppel*, which is applied where the plaintiff's delay arises out of the defendant's fault and the equities for protecting the defendant's interest in timeliness are accordingly reduced. See *Cada*, 920 F.2d at 452-53.

Congress extended the statutory period from two years to three and deleted any reference to tolling, we doubt it meant to allow plaintiffs more than 90 days from correction of the tolling event, at least in the absence of some extraordinary factor that would make so long an extension reasonable.

The decision of the district court is therefore

Affirmed.